

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF MICHIGAN  
NORTHERN DIVISION

KENNETH COLVIN, JR.,

Plaintiff,

v.

Case No. 2:07-cv-61

HON. R. ALLAN EDGAR

PATRICIA CARUSO, et al.,

Defendants.

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**MEMORANDUM AND ORDER**

Plaintiff Kenneth Colvin, Jr. (“Colvin”), a Michigan state prisoner in the custody of the Michigan Department of Corrections (MDOC), brought this federal civil rights action pursuant to 42 U.S.C. § 1983. On September 26, 2008, this Court rendered a memorandum opinion and order [Doc. No. 103] adopting the Magistrate Judge’s report and recommendation [Doc. No. 91] pursuant to 28 U.S.C. § 636(b)(1). After reviewing the record *de novo*, the Court denied plaintiff Colvin’s objections to the report and recommendation. On September 26, 2008, the Court entered a final judgment granting summary judgment in favor of the defendants pursuant to Fed. R. Civ. P. 56 and dismissing Colvin’s entire complaint. [Doc. No. 104].

On October 16, 2008, Colvin filed a notice of appeal. [Doc. No. 105]. The Sixth Circuit Court of Appeals assigned the appeal its Docket No. 08-2441. The current status of the appeal is that the case has been fully briefed by the parties and it stands submitted to the Sixth Circuit Court of Appeals for a decision.

In the meantime, while the appeal is pending in the Sixth Circuit Court of Appeals, Colvin

filed a motion in this District Court on April 22, 2009, seeking relief from the judgment pursuant to Fed. R. Civ. P. 60(b)(1), (3) and (6). [Doc. No. 112]. The District Court lacks jurisdiction to consider and decide Colvin's Rule 60(b) motion while his appeal is pending in the Sixth Circuit Court of Appeals. The filing of Colvin's notice of appeal [Doc. No. 105] operates to transfer jurisdiction of this case to the Sixth Circuit Court of Appeals, and this District Court is currently without jurisdiction to take further action in the case except in aid of the appeal. *Adkins v. Jeffreys*, 327 Fed. Appx. 537, 539 (6th Cir. 2009). The timely appeal by Colvin divests this District Court of jurisdiction to reconsider its judgment under Fed. R. Civ. P. 60(b) until the case is remanded by the Sixth Circuit Court of Appeals. *Adkins*, 327 Fed. Appx. at 539; *Dunham v. United States*, 486 F.3d 931, 935 (6th Cir. 2007); *Pittock v. Otis Elevator Co.*, 8 F.3d 325, 327 (6th Cir. 1993).

The proper procedure is that Colvin may file his Rule 60(b) motion in the District Court. If the District Court indicates that it will grant the Rule 60(b) motion, then appellant Colvin can make a motion in the Sixth Circuit Court of Appeals to remand the case. If the District Court is not disposed to grant Colvin's Rule 60(b) motion, then his appeal will be decided by the Sixth Circuit Court of Appeals in the regular course. *Adkins*, 327 Fed. Appx. at 539; *Dunham*, 486 F.3d at 935; *First National Bank of Salem, Ohio v. Hirsch*, 535 F.3d 343, 346 (6th Cir. 1976).

The decision whether to consider Colvin's Rule 60(b) motion for relief from the judgment while his appeal is pending is within the District Court's discretion. There is no error if the District Court declines to consider the Rule 60(b) motion and decides to let Colvin's appeal run its course in the Sixth Circuit Court of Appeals. *Adkins*, 327 Fed. Appx. at 539; *Dunham*, 486 F.3d at 935; *LSJ Investment Co. v. O.L.D., Inc.*, 167 F.3d 320, 324 (6th Cir. 1999).

After reviewing the record, this Court concludes that it is not disposed to grant Colvin's

motion for relief from the judgment pursuant to Fed. R. Civ. P. 60(b)(1), (3) and (6). Accordingly, the Court **RESERVES** ruling on the motion pending a final decision by the Sixth Circuit Court of Appeals on Colvin's appeal.

SO ORDERED.

Dated: March 29, 2010.

/s/ R. Allan Edgar  
R. ALLAN EDGAR  
UNITED STATES DISTRICT JUDGE